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No. ——

IN THE

Supreme Court of the United States

JAMES R. RANDALL
and
ARCHER-DANIELS-MIDLAND COMPANY,
Petitioners,
v.
DELLWOOD FARMS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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107PP

CONTENTS OF APPENDIX

	Page
A. Opinion of the Court of Appeals (June 19, 2000)....	1a
B. Order of the District Court Granting in Part and Denying in Part ADM's Motion To Quash and Randall's Motion To Intervene and To Quash (March 25, 1999)	11a
C. Amended Order of the District Court Granting in Part and Denying in Part ADM's Motion to Quash and Randall's Motion to Intervene and To Quash (April 27, 1999)	37a
D. Order of the District Court Certifying Controlling Questions of Law Pursuant to 28 U.S.C. § 1292(b).....	65a
E. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.....	68a
18 U.S.C. § 2510	68a
18 U.S.C. § 2511	72a
18 U.S.C. § 2512	81a
18 U.S.C. § 2513	83a
18 U.S.C. § 2514	84a
18 U.S.C. § 2515	84a
18 U.S.C. § 2516	84a
18 U.S.C. § 2517	89a
18 U.S.C. § 2518	90a
18 U.S.C. § 2519	101a
18 U.S.C. § 2520	103a

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 99-2032 et al.

In Re: High Fructose Corn Syrup
Antitrust Litigation

Dellwood Farms, Inc., *et al.*,
Plaintiffs-Appellants / Cross-Appellees,

v.

Archer Daniels Midland Company,
Defendant-Appellee / Cross-Appellant.

James R. Randall,
Intervenor-Appellee / Cross-Appellant.

Appeals from the United States District Court
for the Central District of Illinois.
Nos. 95 C 1477, 97 C1203-**Michael M. Mihm**, *Judge*.

Argued April 14, 2000-Decided June 19, 2000

Before Posner, *Chief Judge*, and Ripple and Rovner, *Circuit Judges*. Posner, *Chief Judge*. These appeals grow out of a class action antitrust suit that is pending in a federal district court in Illinois. The suit is by purchasers from Archer Daniels Midland and other manufacturers and charges

price fixing. In an earlier criminal investigation of the alleged price-fixing conspiracy, an investigation that led to criminal proceedings unnecessary to discuss here, an ADM vice president named Whitacre made a number of secret recordings both of face-to-face conversations, and telephone conversations, with persons who he thought might be (and most of them were, but not intervenor Randall) involved in the conspiracy. He did this under unusual circumstances. He had been defrauding ADM and apparently wanted to deflect the FBI's suspicions and so reported his employer's price fixing to the FBI and suggested that he tape record incriminating conversations. The FBI agreed. Some of the recordings were used in the criminal proceedings but many were not, and those that were not remain in the files of the Justice Department. The plaintiffs in the class action have subpoenaed those recordings. ADM resisted the subpoena, along with its former employee Randall who though not implicated in the price fixing fears that some of the recordings contain embarrassing statements by him on unrelated matters. The Justice Department has no objection to releasing the recordings to the plaintiffs. The district judge ruled that the plaintiffs are entitled to them but, in the case of the telephone conversations, not until the trial. His ruling is before us under 28 U.S.C. § 1292(b).

A set of provisions of the federal criminal code commonly known as "Title III" regulates electronic surveillance both of "oral communications" and "wire communications." 18 U.S.C. §§ 2510 *et seq*. The latter term is broadly defined to include communications any part of which goes over a wire; so cellphone and satellite communications are covered. See 18 U.S.C. § 2510(1); H.R. Rep. No. 647, 99th Cong., 2d Sess. 31 (1986); *United States v. Jackson*, 207 F.3d 910, 914 (7th Cir. 2000); *United States v. Rivera*, 153 F.3d 809, 810-11 (7th Cir. 1998); *United States v. Carrazana*, 921 F.2d 1557, 1562 (11th Cir. 1991); *Shubert v. Metrophone, Inc.*, 898 F.2d 401

(3d Cir. 1990); 1 James G. Carr, *The Law of Electronic Surveillance* § 3.2(a), p. 3-5 (2000). The former term ("oral communications") is rather narrowly defined as a nonelectronic "oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." The district judge thought that the face-to-face conversations that Whitacre surreptitiously recorded were not oral communications within this definition and so were outside the protections of the statute. The judge reasoned that the people whose conversations Whitacre was recording could have had no basis for supposing their conversations not subject to being recorded by one or more of the participants, because the only basis for such an expectation could be the Fourth Amendment, which has been held inapplicable to the recording of conversations to which one of the parties consents. *United States v. Caceres*, 440 U.S. 741, 750 (1979); *United States v. White*, 401 U.S. 745, 751-52 (1971); *Lopez v. United States*, 373 U.S. 427, 439 (1963); *United States v. Eschweiler*, 745 F.2d 435, 437 (7th Cir. 1984).[1]

The telephone conversations that Whitacre recorded clearly fell within the statutory definition of wire communications. But the judge thought a limited disclosure of their contents to the plaintiffs authorized by section 2517(3), which allows a person to disclose the contents of lawfully intercepted wire communications "while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof."

---

1 In *In re John Doe Trader Number One*, 894 F.2d 240, 243 (7th Cir. 1990), *Eschweiler* was erroneously said to have been "reversed," albeit on other grounds, by *Eschweiler v. United States*, 877 F.2d 634 (7th Cir. 1989). Although the later case is related to the earlier one, it did not overrule the earlier one, or, indeed, criticize the earlier decision in any respect.

The judge rejected the argument that the only proceeding contemplated by this provision is a government proceeding, not a private suit such as we have here. But because he interpreted "while giving testimony" literally, to mean that the plaintiffs had no authority to obtain the recordings of Whitacre's wire communications until the trial, he thought it premature to decide whether those communications had been intercepted lawfully, which would mean in conformity with either section 2511 (2)(c) or section 2511 (2)(d). The first of these subsections provides that it is not unlawful under Title III for a person acting under color of law to record his own conversations, and the second that it is not unlawful for a person not acting under color of law to record his own conversations provided that he is not doing so for the purpose of committing a crime or tort.

The district judge was following the law of this circuit in holding that in defining "oral communications" by reference to a justifiable expectation that they would not be intercepted, Congress had limited the protection of the statute to situations in which the interception would violate the Fourth Amendment if done by the government. *In re John Doe Trader Number One*, 894 F.2d 240 (7th Cir. 1990); see also *Dorris v. Absher*, 179 F.3d 420, 424-25 (6th Cir. 1999); *United States v. Longoria*, 177 F.3d 1179, 1181-82 (10th Cir. 1999); *Siripongs v. Calderon*, 35 F.3d 1308, 1320-21 (9th Cir. 1994). One might wonder why, if the statute tracks the Fourth Amendment, the statute's drafters bothered to carve an express exception for oral communications intercepted by one of the parties to the communication, given that such interceptions do not violate the Fourth Amendment. Some cases in other circuits suggest, in conformity with the statutory language, that there can be a reasonable expectation that one's conversations even if not private will not be intercepted electronically. See, e.g., *Angel v. Williams*, 12 F.3d 786, 790 n. 6 (8th Cir. 1993); *Walker v. Darby*, 911 F.2d

1573, 1578-79 (11th Cir. 1990); *Boddie v. American Broadcasting Companies, Inc.*, 731 F.2d 333, 338-39 and n. 5 (6th Cir. 1984). None of the cases, however, involves recording one's own conversations, as in this case.

Another issue on which there is no case law in this circuit is whether the strangely worded section 2517(3) is limited to legal proceedings brought by the government, as held in *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015, 1018-20 (8th Cir. 1993) (en banc), and *National Broadcasting Co. v. United States Department of Justice*, 735 F.2d 51 (2d Cir. 1984), although the wording seems merely a shorthand for the longer and unambiguous definition in the complementary section 2515 of proceedings as covering "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof." See also section 2518(10)(a). Another issue on which authority is scanty is whether section 2517(3) is limited to trials and so excludes discovery, which would be a particularly strange limitation, though it was adopted (albeit in the briefest of discussions) in *In re Motion to Unseal Electronic Surveillance Evidence, supra*, 990 F.2d at 1020.

Regardless of how any of these issues is resolved, we think the plaintiffs are entitled to all the recordings, to use as they see fit except insofar as the district judge may exercise his power under the Federal Rules of Civil Procedure to limit, by protective order or otherwise, such disclosure of the contents of the recordings as may infringe the privacy of parties to the recorded conversations beyond what the plaintiffs require to prosecute their antitrust case effectively. Fed. R. Civ. P. 26(c); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496 (7th Cir. 1996); *Jepson, Inc. v. Makita Electric Works, Ltd.*, 30 F.3d 854, 858-59 (7th Cir. 1994); 8 Charles Alan Wright, Arthur R.

Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2036 (2d ed. 1994).

Some states prohibit a person from recording his telephonic or other conversations without the other person's consent, but Title III does not, unless the person both is not acting under color of state law and has a criminal or tortious purpose. 18 U.S.C. §§ 2511 (2)(c), (d). "While Title III . . . regulates electronic surveillance conducted without the consent of either party to a conversation, federal statues impose no restrictions on recording a conversation with the consent of one of the conversants." *United States v. Caceres, supra*, 440 U.S. at 750. (This is a little broad, in ignoring the exception in section 2511(d) for bad purpose.) If by virtue of sections 2511(2)(c) or (d) an interception is not prohibited by Title III, there are *no* Title III restrictions on its use. Section 2517(3) does not come into play and such questions as whether the section authorizes disclosure only in government proceedings and only at trial drop out; the meaning of "oral communications" also becomes moot.

That interceptions exempted by sections 2511(2)(c) or (d) are not subject to section 2517(3) is apparent from the structure of Title III. Section 2511(1) forbids the interception of covered communications (that is, oral, wire, or electronic) "except as otherwise specifically provided in [Title III]." There are two relevant sets of "otherwise specifically provid[ing]" provisions. One is in subsection 2 of section 2511 and includes, as we have been emphasizing, most conversations intercepted by (or with the consent of) one of the parties. The other exceptions in subsection 2 include pen registers, switchboard operators, marine distress signals, and foreign intelligence surveillance-a heterogeneous array. In each instance the excluded practice is described in its own subsection together with any exceptions to the exception, such as, in the case of section 2511(2)(d), for recording one's conversations for a criminal or tortious purpose. Each of the

exception subsections in section 2511(2) is complete and self-contained. But then there is another set of provisions, sections 2516 to 2519, defining and implementing the key exception for interceptions pursuant to a warrant. It is in that cluster of sections that section 2517(3) resides. Its location indicates that it is limited to cases in which an otherwise unlawful interception is lawful by virtue of having been made pursuant to warrant; the surrounding provisions make clear that the "authorization" to which the subsection refers is judicial authorization, not exemption. See §§ 2516, 2518(9); *Gelbard v. United States*, 408 U.S. 41, 46 (1972); *United States v. Cunningham*, 113 F.3d 289, 293 (1st Cir. 1997). To exempt is not to authorize, though the effect may be the same. So if, as in the case of most interceptions of communications by or with the consent of a party, the interception does not require a warrant to be lawful, Title III does not restrict its use.

The courts (including our own) have repeatedly held this in civil suits under Title III, *Thomas v. Pearl*, 998 F.2d 447, 451-53 (7th Cir. 1993); *Griggs-Ryan v. Smith*, 904 F.2d 112, 119 (1st Cir. 1990); *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir. 1973) (per curiam); *Meredith v. Gavin*, 446 F.2d 794, 799 (8th Cir. 1971)-which the present case is. Section 2511 exempts the conversations covered by it from the *entirety* of Title III. "Since . . . the interception in the case was not obtained in violation of the Act, its subsequent use and disclosure was not a violation of the Act." *Id.*; see also *Obron Atlantic Corp. v. Barr*, 990 F.2d 861, 863-64 (6th Cir. 1993); *Leitman v. McAusland*, 934 F.2d 46, 50 (4th Cir. 1991); *United States v. Shields*, 675 F.2d 1152, 1157 n. 2 (11th Cir. 1982); *United States v. Howell*, 664 F.2d 101, 105 (5th Cir. 1981); *United States v. Head*, 586 F.2d 508, 513 (5th Cir. 1978). As the case last cited put it, "18 U.S.C. § 2511(2)(d) exempts *from the operation of the entire chapter*, of which section 2518 is a part, consensual

recordings such as made here." *Id.* (emphasis added). It is true that some cases *assume* that section 2517(3) applies to conversations exempted by sections 2511(2)(c) or (d), but they are cases in which the court found that the requirements of section 2517(3) had been met, so there was no occasion to consider whether, had they no been met, it would have made any difference, since the conversations were exempt. See *United States v. Little*, 753 F.2d 1420, 1435 (9th Cir. 1984); *United States v. Haimowitz*, 725 F.2d 1561, 1582 (11th Cir. 1984); *United States v. Armocida*, 515 F.2d 49, 52 (3d Cir. 1975); *United States v. Bishton*, 463 F.2d 887, 892 (D.C. Cir. 1972) (per curiam); see also *United States v. Clegg*, 509 F.2d 605, 612-13 (5th Cir. 1975).

To subject interceptions made lawful by sections 2511(2)(c) and (d) to section 2517(3) would have absurd consequences. It would mean that Whitacre had violated the statute by turning his recordings over to the FBI, since on the district court's reading of that section the only permissible disclosure of the contents of an interception made *lawful* by sections 2511(2)(c) or (d) is to play a tape of, or testify to, those contents *in court*. Section 2517(3) reflects a traditional sensitivity about wiretapping and related methods of electronically eavesdropping on other people's conversations. As is implicit (and sometimes explicit) in the cases that hold that such eavesdropping violates the Fourth Amendment but that recording your own conversations does not, there just is not the same sensitivity about the latter practice. Title III does not require a warrant for such recording or regulate its use in any way. The matter has been left to the states, except for the flat prohibition of consensual recording for improper purposes.

So if Whitacre's recordings were made lawful by either of these subsections, Title III does not restrict their use by the plaintiffs. It is clear that they were. When the FBI agreed to Whitacre's suggestion that he make the recordings in order to

gather evidence of price fixing, the FBI made him a government informant, and in then making the recordings in that role he was acting under color of law within the meaning of section 2511(2)(c). *Thomas v. Pearl, supra*, 998 F.2d at 449-51; *Berger v. Hanlon*, 129 F.3d 505, 516 (9th Cir. 1997), rev'd on other grounds, 526 U.S. 808, relevant part of opinion reaffirmed, 188 F.3d 1155 (9th Cir. 1999); *Obron Atlantic Corp. v. Barr, supra*, 990 F.2d at 864-65; *United States v. Haimowitz, supra*, 725 F.2d at 1581-82; *United States v. Shields, supra*, 675 F.2d at 1156-57. (*Obron* and *Haimowitz* are factually indistinguishable from the present case.)

And if this is wrong, it makes no difference; it just puts Whitacre under subsection 2511(2)(d). *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1353 (7th Cir. 1995); *United States v. Zarnes*, 33 F.3d 1454, 1469 (7th Cir. 1994); *United States v. Cassiere*, 4 F.3d 1006, 1021 (1st Cir. 1993); *United States v. Dale*, 991 F.2d 819, 841 (D.C. Cir. 1993). He would not be within the exception to that subsection for recording for a criminal or tortious purpose, because a purpose of gathering evidence of a violation of law is not criminal or tortious. E.g., *United States v. Zarnes, supra*, 33 F.3d 1454, 1469 (7th Cir. 1994); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 959 (7th Cir. 1982); *United States v. Dale, supra*, 991 F.2d at 841; *United States v. Ruppel*, 666 F.2d 261, 271 (5th Cir. 1982); 1 Carr, *supra*, § 3.5(b), p. 3-112. It is the opposite. True, his *motive* in making the recordings may have been criminal or tortious (or more likely both)-to elude detection of his fraud against ADM by becoming a valued FBI informant and good-guy whistleblower. But when the law speaks of recording conversations with a criminal or tortious purpose, it has, we think, regard for the intended use of the recordings. There was nothing of that here. It was not as if Whitacre were going to use the recordings to blackmail Randall or extort money from ADM. He was going to give them to the FBI for

use in evidence, a clearly lawful purpose, as the cases we have cited make clear. To repeat, *so far as what was recorded* was concerned, the intent was to collect evidence of antitrust violations, not evidence that might be used for an improper purpose. The recordings were no more unlawful than an arrest would be by a police officer who wanted to demonstrate zeal in the performance of his duties in the hope that it would shield him from prosecution for embezzling funds of the police department.

The judgment of the district court is modified to eliminate the restriction that the court placed on the use of the recordings of the wire communications by the plaintiffs, though without prejudice to the judge's considering whether to impose a protective order under Fed. R. Civ. P. 26(c). As so modified, the judgment is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

MDL NO. 1087 and
Master File No. 95-1477

IN RE: HIGH FRUCTOSE CORNSYRUP
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO
ALL ACTIONS

ORDER

This matter is before the Court on Defendant Archer Daniels Midland Company's ("ADM") Motion to Quash or, in the Alternative, to Modify Plaintiffs' Subpoena and James R. Randall's ("Randall") Motion to Intervene and to Quash Class Plaintiffs' Subpoena Duces Tecum. For the reasons stated herein, ADM's Motion to Quash is GRANTED IN PART and DENIED IN PART, and Randall's Motion to Intervene and to Quash is GRANTED IN PART and DENIED IN PART.

Factual Background

For a period of approximately two and one half years, Mark Whitacre ("Whitacre"), former corporate vice president and president of ADM's BioProducts division, recorded or consented to the recording of hundreds of hours of his conversations with other ADM personnel and third parties. On October 28, 1996, Plaintiffs served a subpoena *duces*

tecum on the custodian of records for the United States Department of Justice ("the DOJ") seeking production of the tapes made by or with the consent of Whitacre. After unsuccessful negotiations with the DOJ, Plaintiffs moved to compel compliance with the subpoena. On February 26, 1997, this Court held a hearing on the Motion to Compel and ruled that those tapes pertaining to lysine only and those tapes which had been disclosed to the law firm of Simpson Thatcher & Bartlett, counsel to a committee of ADM's board should be disclosed to Plaintiffs.

On April 10, 1997, the Court granted the DOJ's request for certification of interlocutory appeal under 28 U.S.C. § 1292(b). On October 30, 1997, the Seventh Circuit reversed this Court's ruling with instructions to quash Plaintiffs subpoena for invading the law enforcement investigatory privilege. See *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126, 1128 (7th Cir. 1997).

On November 24, 1998, Plaintiffs served a subpoena *duces tecum* on the Department of Justice seeking, *inter alia*, all recordings made by or with the consent of Whitacre during the FBI's investigation. On January 22, 1999, the DOJ agreed to produce the approximately 200 tapes that remain from the DOJ's criminal antitrust investigation. Those tapes introduced in the criminal trial of *United States v. Andreas*, 96 CR 762 (N.D. III), which are not included in the 200 figure, are already part of the public record and have been delivered to Plaintiffs and Defendants. On February 12, 1999, ADM moved to quash, or in the alternative, to modify Plaintiffs' subpoena seeking the disclosure of the remaining tapes. In its Motion to Quash, ADM argues that the subpoena must be quashed because Whitacre's taping violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, in that the tapes were not made under color of law pursuant and/or were made with a criminal or tortious purpose. *See* 18 U.S.C. §§ 2511(2)(c) and (2)(d).

ADM further argues that even if the tapes were lawfully made either pursuant to § 2511(2)(c) or (2)(d), Title III does not permit the disclosure of the tapes in an action in which the Government is not a party. *See* 18 U.S.C. § 2517(3). In the alternative, ADM argues that if this Court holds that the tapes may be discovered by Plaintiffs that it appoint a special master to recommend to the Court which portions, if any, of the tapes should be redacted due to a lack of relevancy.

On March 2, 1999, Randall, who served as president of ADM until 1997, moved to intervene and to quash Plaintiffs' subpoena. In his Motion to Intervene and to Quash and accompanying Memorandum in Support, Randall asserts that he is an "aggrieved person" under 18 U.S.C. § 2510(11) because he believes that approximately 20 of his conversations were unlawfully intercepted by Whitacre. Therefore, according to Randall, he should be allowed to intervene pursuant to 18 U.S.C. § 2518(10)(a). In support of his Motion to Quash, Randall asserts the same or similar arguments that are asserted by ADM: the tapes were unlawfully made and Title III does not authorize disclosure to private civil litigants in a case in which the Government is not a party.

The Court held oral arguments on March 22, 1999. This Order follows.

Discussion

I. Standing

Section 2518(10) of Title III provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral

> communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that--
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice.

18 U.S.C. § 2518(10)(a). Section 2510(11) of Title III defines "aggrieved person" as "a person who was party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11). This provision has been interpreted as conferring standing upon those persons who are (1) "person[s]" under 18 U.S.C. § 2510(6) and (2) either were parties to the intercepted communication or parties on whose premises the intercepted communication took place. *See Alderman v. United States,* 394 U.S. 165, 176 & n.9 (1969); *United States v. Civella,* 648 F.2d 1167, 1171 & n.11 (8th Cir.), *cert. denied,* 454 U.S. 867 (1981).

Plaintiffs do not argue that ADM does not have standing to challenge the disclosure of the tapes. They do, however, argue that Randall does not have standing to intervene. In support of this argument, Plaintiffs cite the case of *United States v. Dorfman*, 690 F.2d 1217 (7th Cir.1982) ("*Dorfman I* "). In *Dorfman I*, five defendants in the underlying criminal case filed a motion to suppress material obtained by a court-authorized electronic surveillance. The district court denied the motion to suppress. In addition to the defendants' challenge to the wiretap, there were two other related challenges. The first related challenge was brought by five persons whose conversations were intercepted but who were not charged in the indictment. Following the entry of the order denying the defendants' motion to suppress, these five persons filed a motion to suppress the intercepted conversations in which they participated and to obtain access to the transcripts of those intercepted conversations. The district court held that Title III does not grant a suppression remedy broader than that provided by the Fourth Amendment and, therefore, as non-parties, the five people did not have standing under Title III to challenge the wiretap conversations in which they unknowingly participated. These five people appealed the district court's order. *See id.* at 1219-21.

The second related challenge was filed by a gentleman by the name of William Webbe ("Webbe"). Webbe was named in the indictment as an unindicted co-conspirator. Six days after the district court entered its order denying the nonparties' motion to suppress, Webbe filed his own motion to suppress the conversations in which he was a party. After allowing Webbe access to the recordings at issue, the district court denied Webbe's motion to suppress because: (1) Webbe was fully aware of the earlier hearings involving the defendants' motion to suppress but chose not to participate, thereby raising a "classic" case for the application of the

common law doctrine of laches"; (2) Webbe had already challenged the lawfulness of the surveillance when he was called to testify before the grand jury; (3) Webbe was not a named interceptee on the authorization order and, therefore, lacked standing to challenge the facial validity of the order; and (4) his motion was denied on the merits for the same reason that the defendants' motion was denied on the merits. *Dorfman I*, 690 F.2d at 1221. Webbe also appealed the district court's ruling.

On appeal, the Seventh Circuit addressed the non-parties' (the five non-party people and Webbe) arguments together. The court of appeals noted that the nonparties were all participants in conversations intercepted under the court authorization in question. Further, their conversations were to be used in a "'trial ... before ... (a) court ... of the United States.'" *Id.* at 1226 (quoting § 2518(10)(a)). Therefore, according to the *Dorfman I* court, "under a literal reading of the statute they are 'aggrieved persons' in a position to move for suppression pursuant to Section 2518(10)(a)." However, the court of appeals still held that the nonparties lacked standing to challenge the recordings. The court stated that because the "defendants were able to test the legality of the interceptions of all the communications that the government intend[ed] to use at trial," the involvement of the nonparties was unnecessary. *Id.* at 1229. The court of appeals further stated:

> Denying the nonparties standing in this context did not deny the court an opportunity to evaluate the legality of the underlying interceptions. . . . Rather, it simply foreclosed the nonparties from separately retesting the legality of the interceptions of their conversations.

Id.

In the course of its opinion, the *Dorfman I* court distinguished its decision from one reached by the Tenth

Circuit in *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), *cert. denied*, 457 U.S. 1153 (1982), a case relied upon by Randall in his Memorandum in Support of his Motion to Intervene and Quash. In *Anthony*, the defendant was convicted of unlawful interception of the wire communications of several individuals, among them, Dr. Vernon Sisney. After entry of the verdict, the defendant moved for discovery of the contents of the tapes of intercepted communications that the defendant had made and that the government had subsequently seized. In response, Dr. Sisney moved to intervene for purposes of opposing the discovery and to suppress the tapes in accordance with 18 U.S.C. § 2515. The district court denied the motion, reasoning that Dr. Sisney did not have standing to suppress the information. The Tenth Circuit reversed and held that Dr. Sisney was, in fact, an "aggrieved person" entitled to invoke the sanction of suppression set forth in § 2515 of Title III. *Id.* at 878.

Distinguishing its case from the *Anthony* case, the *Dorfman I* court stated:

> In *Anthony*, absent Dr. Sisney's involvement, there would have been no one in a position to contest the use or disclosure of the intercepted communications. The only other party to the proceeding, the government, clearly was not an "aggrieved person" as to the challenged conversations. Thus, had the court denied Dr. Sisney standing, his privacy interest in nondisclosure would have been left totally unprotected.

Dorfman I, 690 F.2d at 1229. The *Dorfman I* court further pointed out that had the *Anthony* court denied the nonparty standing to move for suppression, the court "would have been placed in the anomalous position of overseeing the disclosure of admittedly unlawfully intercepted conversations." *Id.* at 1229 n.20.

Randall attempts to distinguish *Dorfman I* from this case. He correctly argues that on more than one occasion the court stated that its decision was based on the facts of the case before it. According to Randall, the "critical facts" in *Dorfman I* were the criminal context of the case and the belated nature of the nonparties' motions to suppress. Randall further asserts that unlike Webbe in *Dorfman I*, he "was not indicted in the criminal case, was not a witness at a grand jury, was not a witness at trial for either side, and had absolutely no role in the defense or prosecution of the criminal case." (Randall Reply at 9).

One interpretation of *Dorfman I* is that the distinctions pointed out by Randall are not critical distinctions. Arguably, the *Dorfman I* relied only upon the fact that the defendants were able to test the legality of the interceptions, thereby foreclosing the need of the nonparties to retest the legality of the interceptions. *See Dorfman I* at 1229. A reading of Randall's Memorandum in Support of his Motion to Intervene and to Quash indicates that he is either making or reformulating the arguments made by ADM in its Motion to Quash. Therefore, even though the language of § 2518(10)(a) supports Randall's right to intervene in this case, one reading of *Dorfman I* seems to imply that if a party to the litigation is testing the legality of alleged unlawful interceptions, there is no need, and hence no standing, for a nonparty to test the legality on the same grounds.

However, upon reconsideration of its oral finding made during the March 22, 1999, oral arguments on this matter hearing that Randall did not have standing to intervene, the Court now finds that it cannot overlook the language in *Dorfman I* that the district court's denial of the nonparties standing "in [that] context" did not deny the district court the opportunity to test the legality of the tapes at issue. *See id.* at 1229. Instead, "it simply foreclosed the nonparties from *separately retesting* the legality of the interceptions of their

conversations." *Id.* (emphasis added). While Randall's arguments are virtually the same as ADM's, he is not "retesting" the legality of the tapes at issue. He appears before this Court at the same time as ADM to test the legality of the tapes. Therefore, since the Court is not dealing with a *separate retesting* of the legality of the tapes, but instead a contemporaneous challenge, the Court does not believe that the *Dorfman I* court would hold that Randall does not have standing to intervene. Accordingly, this Court holds that Randall does have standing to intervene pursuant to § 2510(10)(a).

II. "Oral Communication"

The tapes made by Whitacre include both tape recordings of telephone conversations and tape recordings of conversations in which Whitacre and the other person or persons being recorded were physically present in the same room at the same time ("face to face recordings"). Plaintiffs initially argue that Title III does not apply to the recordings of the face to face conversations. For this proposition, Plaintiffs point to the definition of "oral communications" in 18 U.S.C. § 2510(2):

> "[O]ral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception *under circumstances justifying such expectation*. . . .

(emphasis added).

In *In the Matter of John Doe Trader Number One,* 894 F.2d 240, 242 (7th Cir.1990), the Seventh Circuit stated:

> According to the legislative history of Title III, [the definition of "oral communication"] was intended to parallel the "reasonable expectation of privacy" test

> created by the Supreme Court in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *See* S.Rep. No. 1097, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin.News 2112-2274. *See also United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985). Thus, Congress limited its protection of "oral communications" under Title III to those statements made where "first, a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'

(Alterations in original); *see also Angel v. Williams*, 12 F.3d 786, 790 (8th Cir.1993) ("We know from the legislative history of the federal wiretap law that the definition of oral communication is intended to reflect existing [Fourth Amendment] law"). Therefore, in order to determine whether the face to face recordings were "oral communications" for purposes of 18 U.S.C. § 2510(2), the Court must ascertain whether those persons recorded by Whitacre during face to face recordings had a reasonable expectation of privacy. *See id.* at 242-43.

In *John Doe Trader*, Doe's conversations were recorded while the defendant was on the floor of the Chicago Mercantile Exchange ("CME"). As stated by the court of appeals:

> Doe's conversations were overheard on the trading floor of the CME. Appellant himself describes this environment as "typically noisy and frantic." The FBI agent conducting the investigation was clearly present only a few feet from Doe and he was able to overhear and record each of Doe's statements. In fact, the agent was a participant in many of these conversations. The tape recorder concealed on the agent was unable to hear more than the agent himself could. Thus, by exposing these statements to the public in this manner, Doe cannot

> now contend that he reasonably believed his conversations were private and therefore subject to constitutional protection.

Id. The *John Doe Trader* court held that Doe did not have an objectively reasonable expectation of privacy in the recorded statements and, therefore, the recorded statements were not "oral communications" under § 2510(2). *Id.* at 245.

ADM[1] contends that *John Doe Trader* is readily distinguishable from this case, as the recordings in *John Doe Trader* were made on the busy and frantic floor of the CME, whereas the face to face recordings made by or with the consent of Whitacre were made on ADM's premises. The Court agrees that the floor of the CME may be more frantic than an office or conference room at ADM, and a more public setting. However, this distinction is not dispositive on the issue of whether those people who were recorded by Whitacre during face to face recordings possessed a reasonable expectation of privacy. In *United States v. White*, 401 U.S. 745 (1971), the Supreme Court stated:

> *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), which was left undisturbed by *Katz*, held that however strongly a defendant may trust an apparent colleague, his expectations [that a person with whom he is conversing will then or later reveal the conversation to police] are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, "no interest

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[1] Because Randall's arguments are the same as ADM's, the Court's reference to ADM in the Discussion portion of the Order refers to both ADM and Randall with the exception of Part IV of the Discussion portion, which addresses an argument not made by Randall—whether the Court should appoint a special master.

> legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States,* at 302, 87 S.Ct., at 413. No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, . . . , or when the same agent, unbeknownst to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. . . .

White, 401 U.S. at 749.

In *Hoffa,* Edward Partin ("Partin"), a Teamsters Union official, made repeated visits to James Hoffa's ("Hoffa") hotel suite during the pendency of the Test Fleet trial in 1962 in Nashville, Tennessee. Unbeknownst to Hoffa, Partin was acting as a government informant and made various reports to federal agents concerning conversations held with Hoffa and his associates, disclosing, among other things, endeavors to bribe the Test Fleet jury. One of the petitioners argued that Partin failed to disclose his role as a government informer and, therefore, this vitiated the consent given to Partin to enter the hotel suite and listen in on or participate in the various discussions. The Supreme Court rejected this argument. Although recognizing that a hotel room "can clearly be the object of Fourth Amendment protection," the Court stated:

> In the present case, however, it is evident that no interest legitimately protected by the Fourth Amendment is involved. It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin or in Partin's presence. Partin did not enter the suite by force or by stealth. He was not a surreptitious

eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of his hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing.

Hoffa, 385 U.S. at 302.

Similarly, those people who were recorded by Whitacre in his presence were relying on their misplaced confidence that Whitacre would not reveal the contents of the conversations. ADM has not argued that Whitacre's presence during these conversations was without consent or that he was a surreptitious eavesdropper. In short, while those people recorded by Whitacre on ADM's premises may have had a subjective expectation that their conversations would be kept private (based on location and also the fact that ADM officials, to include Whitacre, had signed nondisclosure agreements), it was not a reasonable expectation in light of *Hoffa* and *White*. As succinctly stated by the *White* Court:

> Our problem, in terms of the principle announced in *Katz,* is what expectations of privacy are constitutionally "justifiable"--what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants exemplified by *Hoffa* .... If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.

White, 401 U.S. at 751-52 (citation omitted).

ADM, however, argues that the Court's conclusion that the face to face recordings are not recordings of "oral communications" under Title III renders 18 U.S.C. §§ 2511(2)(c) and (2)(d) meaningless. Section 2511(2)(c) provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Section 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

ADM argues that if the face to face recordings are not "oral communications" and, therefore, not subject to the restrictions of Title III, then why did Congress provide that it shall not be unlawful to intercept an oral communication when a person does so acting under color of law or without a tortious or criminal purpose and is a party to the conversation or gives prior consent? *See* §§ 2511(2)(c) and (2)(d).

The Court is not unsympathetic to ADM's argument. On the one hand, the case law in this and other circuits is clear that the definition of "oral communication" in § 2510(2) is intended to parallel the reasonable expectation of privacy test set forth in *Katz*. *See John Doe Trader*, 894 F.2d at 242; *see also Angel*, 12 F.3d at 790. Precedent also clearly establishes

that an alleged wrongdoer does not have a reasonable expectation that a trusted accomplice will not disclose the contents of conversations to the authorities or that the conversations will not be recorded by the accomplice. *See, e.g., White,* 401 U.S. at 751-52. On the other hand, Congress uses the term "oral communication" in §§ 2511(2)(c) and (2)(d) in the same breath that it uses "where such person is party to the communication or one of the parties to the communication has given prior consent to such interception." Therefore, it appears that Congress contemplated that some face to face, consensual recordings would involve a reasonable expectation of privacy on the part of the person or persons who were unaware that they were being recorded.

The Court is well aware of the statutory construction maxim that a statute should not be construed in such a manner as to render words or phrases meaningless, redundant, or superfluous. *See Welsh v. Boy Scouts of Am.,* 993 F.2d 1267, 1272 (7th Cir.) (citation omitted), *cert. denied,* 510 U.S. 1012 (1993). However, if the Court accepted ADM's argument that Whitacre's consensual, face to face recordings are "oral communications" under § 2510(2), then this Court would have to disregard the precedent that clearly establishes that the definition of "oral communication" parallels the Fourth Amendment reasonable expectation of privacy test established *Katz* and further disregard the case law precedent that holds the Fourth Amendment does not give an alleged wrongdoer protection against a trusted accomplice tape recording or divulging the contents of conversations. In addition, §§ 2511(2)(c) and (2)(d) also refer to wire and electronic types of communication, which, at least in the case of wire communications, are protected against interception regardless of the speaker's reasonable expectation of privacy. *See, e.g., Briggs v. American Air Filter Co., Inc.,* 630 F.2d 414, 417 n.4 (5th Cir.1980). While this does not completely address the apparent conflict between § 2510(2) and

§§ 2511(2)(c) and (2)(d), it is clear that §§ 2511(2)(c) and (2)(d) are broader in scope, as they pertain to all three types of communications defined in Title III and not just oral communications.

Accordingly, despite the apparent conflict between § 2510(2) and §§ 2511(2)(c) and (2)(d), the Court concludes that those tape recordings made by or with the consent of Whitacre of conversations at which he and the other person or persons being recorded were physically present are not recordings of "oral communications" and shall be turned over to Plaintiffs and Defendants for purposes of this litigation.

III. 18 U.S.C. § 2517(3)

Although the Court has held that the face to face recordings are not recordings of "oral communications," the issue remains whether the interception of telephone calls by Whitacre may also be disclosed in this litigation. In *Briggs, supra*, the Fifth Circuit stated that a telephone conversation is a "wire communication" as that term is defined in 18 U.S.C. § 2510(1). *Briggs*, 630 F.2d at 417. Such communications are protected against interception by electronic, mechanical, or other devices regardless of the speaker's expectation of privacy. *See id.* at 417 n.4; *see also United States v. Harpel*, 493 F.2d 346, 349 (10th Cir.1974) (recognizing lack of requirement to prove reasonable expectation of privacy with regard to intercepted wire communications). Accordingly, the Court's preceding expectation of privacy analysis has no bearing on whether the contents of the interceptions of wire communications may be disclosed in this case.

ADM argues that the interceptions of telephone calls may not be disclosed under § 2517, which sets forth under what circumstances lawful interceptions may be disclosed. Plaintiffs, on the other hand, argue that consensual recordings of telephone conversations that are made in accordance with

§ 2511(2)(c) or (2)(d) are exempt from the restrictions of § 2517. For purposes of this analysis, the Court assumes that the wire communications intercepted by Whitacre were lawful under either § 2511(2)(c) or (2)(d).

The specific provision at issue is § 2517(3), which provides:

> Any person who has received *by any means authorized by this chapter*, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted *in accordance with the provisions of this chapter* may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

According to Plaintiffs, interceptions that are made by "consent" or "under color of law" are not "by means authorized by this chapter." They argue that only 18 U.S.C. §§ 2516 and 2518 in Title III describe a procedure to obtain "authorization and approval" by a court for interceptions of wire or oral communications and by Congress using the term "authorized" in § 2517(3) it was referring only to interceptions authorized under §§ 2516 and 2518, not consensual interceptions.

Section 2516 is entitled "Authorization for interception of wire, oral, or electronic communications" and provides, in pertinent part:

> The Attorney General . . . may *authorize* an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order *authorizing* or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency

> having responsibility for the investigation of the offense as to which the application is made . . . .

18 U.S.C. § 2516(1) (emphasis added). Subsections 2516(2) and (3) provide the same type of authorization to States' Attorneys General, States' Attorneys and United States Attorneys. Section 2518 then sets forth the procedure for filing an application with a judge of competent jurisdiction:

> Each application for an order *authorizing* or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include [the information listed in subsections (1)(a) through (1)(f)].

18 U.S.C. § 2518(1) (emphasis added).

Plaintiffs, however, have failed to point out § 2511(1)(e)(i) uses the term "authorized" in the context of § 2511(2)(c). Section 2511(1)(e)(i) provides that any person who:

> intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, *intercepted by means authorized by* sections 2511(2)(a)(ii), *2511(2)(b) to (c),* 2511(2)(e), 2516, and 2518 of this chapter . . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(Emphasis added). Therefore, it is clear that use of the term "authorized" is not limited to §§ 2516 and 2518.

ADM argues that in addition to § 2511(1)(e)(i) using the term "authorized" in the context of § 2511(2)(c), Plaintiffs have focused on the wrong phrase in § 2517(3). According to ADM, the relevant phrase in § 2517(3) is "in accordance with

the provisions of this chapter." ADM contends that consensual recordings pursuant to § 2511(2)(c) or (2)(d) are interceptions made "in accordance with the provisions of this chapter" and, therefore, are subject to the restrictions of § 2517(3). ADM further cites case authority in support of its argument that § 2517(3) governs the admissibility of tape recordings when they are made in accordance with § 2511(2)(c). In *United States v. Armocida,* 515 F.2d 49 (3rd Cir.), *cert. denied,* 423 U.S. 858 (1975), the defendant challenged the admissibility of certain tape recordings. In upholding the district court's order allowing the tapes, the Third Circuit stated:

> We agree with the Government that the warrantless recordings of a telephone conversation with the consent of only one of the parties is perfectly proper under federal law and that the transcript of such a conversation may be admitted into evidence in a federal prosecution. 18 U.S.C. §§ 2511(2)(c) and 2517(3), taken together, specifically authorize the admission into evidence of warrantless recordings of this type.

Id. at 52; *see also United States v. Infelice,* 506 F.2d 1358, 1365 (7th Cir. 1974) (citing §§ 2511(2)(c) and 2517(3) in support of a holding that tapes made by a government informant were admissible), *cert. denied,* 419 U.S. 1107 (1975); *United States v. Upton,* 502 F.Supp. 1193, 1199 (D.N.H. 1980) ("Read, as they must be, together, 18 U.S.C. § 2511(2)(c) and § 2517(3) specifically authorize the admission into evidence of recordings of this type.").

The Court agrees that the phrase "intercepted in accordance with the provisions of this chapter" in § 2517(3) clearly contemplates interceptions of consensual recordings made in accordance with § 2511(2)(c) or (2)(d). In other words, consensual recordings that are made under color of law or without a criminal or tortious purpose are recordings made "in accordance with" Title III. Accordingly, the Court holds

that § 2517(3) controls the disclosure of the recordings of wire communications made by Whitacre.

Reaching this conclusion, however, provides, at best, only a small piece of the statutory puzzle. ADM argues that even assuming the tapes made by Whitacre of phone conversations were lawfully made pursuant to § 2511(2)(c) or (2)(d), § 2517(3) prohibits their disclosure in civil cases in which the Government is not a party. In *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015 (8th Cir. 1993) (en banc) (7-5 decision), which is the principal case relied upon by ADM, the Eighth Circuit held that there is no authority in Title III for pretrial or compelled testimonial disclosure of sealed electronic surveillance evidence to a private civil RICO litigant. *Id.* at 1020. The *Electronic Surveillance* majority stated that while the argument for disclosure to private civil litigants based on the language of § 2517(3) has "surface plausibility", there is no indication in the legislative history that Congress ever intended to open the discovery door in Title III to private civil litigants:

> As originally enacted, section 2517(3) provided for courtroom testimonial disclosure only in criminal proceedings. . . . With the passage of RICO in 1970, Congress amended the wiretap statute to allow for testimonial use in civil proceedings as well. Organized Crime Control Act of 1970, Pub.L. No. 91-542, § 902(b), 84 Stat. 922, 947 (1970). In support of his argument that the statute now authorizes pretrial discovery, Smith cites cases in which wiretap evidence has been used by an agency other than that which initially sought the wiretap. For example, Smith cites to cases in which the Internal Revenue Service obtained wiretap evidence from the FBI for use in civil prosecutions. Such cases provide no authority for disclosure, pretrial or otherwise, to a private civil litigant.

The legislative history of the 1970 amendment adds little support to Smith's argument. As the district court noted, the legislative history merely indicates the obvious, that the change "amends 18 U.S.C. 2517 to permit evidence obtained through the interception of wire or oral communications under court order to be employed in civil actions." The language of this brief commentary suggests, however, that Congress envisioned the gatherer of such evidence, *i.e.*, a law enforcement or governmental investigative agency, to be the party making use of the evidence in a civil case. *If the change had been intended to open the door to private civil litigants, further comment would have been warranted.*

Id. at 1018-19 (emphasis added).

The *Electronic Surveillance* court is not alone in its holding. In *National Broadcasting Co. v. United States Dep't of Justice*, 735 F.2d 51 (2nd Cir. 1984), the Second Circuit held that NBC was not entitled to surveillance tapes made by the DOJ. NBC's alleged need for the tapes at issue arose out of a libel suit brought against NBC by Wayne Newton. Since the issue of falsity was at the center of the libel action, NBC sought permission to inspect and copy for use in its defense various materials surrounding and including interceptions made by the Government in a related RICO criminal case. In pursuing this information, NBC relied upon § 2517(3), and like the party that sought interceptions in *Electronic Surveillance, supra*, NBC relied upon the 1970 amendments to Title III which expanded § 2517(3) to include civil proceedings. The Second Circuit rejected this argument, stating, "[W]e are sure that Congress did not utilize a provision of the Organized Crime Control Act [of 1970] to make the fruits of wiretapping broadly available to all civil litigants who show a need for them." *NBC*, 735 F.2d at 54; *see also County of Oakland v. City of Detroit*, 610 F.Supp. 364, 370 (E.D. Mich. 1984) (same).

While this Court respects the decisions of the Second and Eighth Circuits, and gives substantial deference to them, it is not bound by them. Section 2517(3) unambiguously states that the contents of lawful interceptions may be disclosed "while giving testimony under oath or affirmation *in any proceeding held under the authority of the United States* or of any State or political subdivision thereof." (Emphasis added) If Congress intended to limit disclosure of contents of interceptions to cases in which the Government is a party, it chose the wrong language to do so. The phrase "in any proceeding held under the authority of the United States" is not limiting in nature and includes a private, civil antitrust action brought under the Sherman Act, which is a proceeding held under the authority of this United States district court.

ADM, however, argues that even if § 2517(3) facially permits disclosure in civil litigation in which the Government is not a party, § 2517(3) does explicitly not allow for pre-trial discovery of the wire interceptions. For this proposition, ADM cites the cases of *County of Oakland, supra,* 610 F.Supp. at 370-71, and *Dowd v. Calabrese,* 101 F.R.D. 427, 435 (D.D.C.1984) (disclosure of interceptions can be made only during the testimony of a Government agent). In *Dowd,* for example, two Assistant U.S. Attorneys brought libel actions against the Wall Street Journal ("the Journal") for a story that asserted that the attorneys improperly pressured an individual into testifying at a criminal trial. The Journal filed motions to compel which sought disclosure of two wiretap tapes. The Journal claimed that the tapes would support the truthfulness of its story. A portion of these tapes were presented during the criminal trial. The *Dowd* court ruled that the Journal was entitled to the portions of the tapes which were made public. As to the remaining tapes, the court stated, "There are several problems with this request. In the first place, section 2517(3) of Title III . . . explicitly provides for disclosure only 'while [the individual is] giving testimony

under oath or affirmation.' . . . That is not what is involved here." *Id.* at 435. The *Dowd* court took the position that disclosure of the wiretap materials not presented in a trial cannot be required pursuant to pre-trial discovery subpoenas.

Admittedly, § 2517(3) does not explicitly authorize pre-trial disclosure of the contents of wire interceptions. On the one hand, pre-trial disclosure seems implicit if such interceptions can be used "in any proceeding held under that authority of the United States . . . ." § 2517(3). On the other hand, by permitting disclosure of lawfully obtained intercepts "only under the specific circumstances listed in 18 U.S.C. § 2517, *Title III implies that what is not permitted is forbidden* . . . ." *United States v. Dorfman,* 690 F.2d 1230, 1232 (7th Cir. 1982) ("*Dorfman II*") (emphasis added). So, the Court is faced with a statutory quagmire. The broad language "in *any* proceeding held under the authority of the United States" clearly contemplates use of interceptions in civil litigation even when the Government is not a party. On the other hand, the phrase preceding this broad language --"while giving testimony under oath or affirmation"-- does not contemplate the type of pre-trial discovery sought by Plaintiffs of the interceptions made by Whitacre of telephone conversation. Plaintiffs asserted during oral argument that the initial disclosure of the wire interceptions from the DOJ to the parties could occur by way of deposition or affidavit, which would, perhaps, technically meet the "under oath or affirmation" requirement of § 2517(3). However, testimony or affidavits are one thing, but turning over the interceptions of the telephone conversations is something else.

Again, the Court fully recognizes the conflict between its conclusions with respect to § 2517(3) -- the language contemplates use at trial but does not address pre-trial discovery. Whether Congress intended such a result, the Court can only guess. However, this Court must be guided by the words used by Congress and the precedent that

establishes that what is not permitted under § 2517 is forbidden.[2]

As a final comment on this issue, it is the Court's belief that Congress needs to clarify the language in § 2517. In fact, the other statutory issues addressed in this Order point to a need for Congressional review of this statute. While judges are correctly admonished to refrain from rewriting legislation, we are sometimes forced to interpret legislation that is contradictory or ambiguous.

IV. Special Master

ADM argues that it is likely that there are portions of the face to face recordings which are irrelevant to the issues in this litigation and, therefore, this Court should appoint a special master to review the tapes and recommend to the Court which portions of the tapes, if any, should be redacted prior to the tapes being provided to Plaintiffs. The Court, while not unsympathetic to ADM's arguments denies this request.

There is already in place in this case the First Addendum to the Protective Order of May 2, 1996, which restricts the availability of the tape recordings to specified attorneys for Plaintiffs and Defendants ADM, Cargill, A.E. Staley Manufacturer, and American Maize Products Company (now known as Cerestar USA, Inc.). (*See* Doc. #279, First Addendum to the Protective Order of May 2, 1996). After Defendants have reviewed the tapes ordered to be turned over and have identified which portions they believe to be

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[2] Because the Court has held that the contents of the interceptions of wire communications are not discoverable during pre-trial proceedings, the parties agree that there is not a need for any further hearing at this time to determine whether the interceptions were lawfully made pursuant to § 2511(2)(c) or (2)(d).

irrelevant to this case and the tag-along case of *Gray & Co. v. ADM, et al.*, they may seek relief from this Court in the form of redacting the alleged irrelevant portions of the tapes if they are unable to reach an agreement with Plaintiffs.

The parties are in a much better position than a special master would be in of determining what information from the tapes is relevant to this case. This is true even if the Court and the parties were to give a special master a crash course on a case that is nearing the four year mark.

Accordingly, the request for a special master is denied.

Conclusion

For the reasons stated herein, ADM's Motion to Quash or, in the Alternative, to Modify Plaintiffs' Subpoena is GRANTED IN PART and DENIED IN PART and Randall's Motion to Intervene and to Quash Class Plaintiffs Subpoena Duces Tecum is GRANTED IN PART and DENIED IN PART.

Those tape recordings made by or with the consent of Whitacre of conversations at which he and the other person or persons being recorded were physically present shall be turned over to Plaintiffs and Defendants. Plaintiffs and Defendants shall handle the tapes in accordance with the First Addendum to the Protective Order of May 2, 1996. Randall's attorney, Jeffrey Cole, shall also be allowed to review those portions of the face to face recordings to which Randall was a party. Prior to reviewing the tapes, however, Mr. Cole shall read the Protective Order of May 2, 1996 and the First Addendum to the Protective Order, sign a copy of the certificate attached as Exhibit B to the First Addendum, and return the certificate to this Court. The Clerk of the Court shall send a copy of the Protective Order and First Addendum (Doc. Nos. 98 and 279) via first class mail to Mr. Cole. He shall review the tapes at the law firm of Williams &

Connolly, which is the law firm that, pursuant to paragraph four of the First Addendum to the Protective Order, is designated as the custodian of tapes for the single copy provided to Defendants.

The interceptions of telephone conversations made by or with the consent of Whitacre are not discoverable.

Lastly, the Court denies ADM's request to appoint a special master.

ENTERED this 25th day of March, 1999.

Michael M. Mihm
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

MDL NO. 1087 and
Master File No. 95-1477

IN RE: HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

AMENDED ORDER

This matter is before the Court on Defendant Archer Daniels Midland Company's ("ADM") Motion to Quash or, in the Alternative, to Modify Plaintiffs' Subpoena and James R. Randall's ("Randall") Motion to Intervene and to Quash Class Plaintiffs' Subpoena Duces Tecum. For the reasons stated herein, ADM's Motion to Quash is GRANTED IN PART and DENIED IN PART, and Randall's Motion to Intervene and to Quash is GRANTED IN PART and DENIED IN PART.

Factual Background

For a period of approximately two and one half years, Mark Whitacre ("Whitacre"), former corporate vice president and president of ADM's BioProducts division, recorded or consented to the recording of hundreds of hours of his conversations with other ADM personnel and third parties. On October 28, 1996, Plaintiffs served a subpoena *duces tecum* on the custodian of records for the United States Department of Justice ("the DOJ") seeking production of the

tapes made by or with the consent of Whitacre. After unsuccessful negotiations with the DOJ, Plaintiffs moved to compel compliance with the subpoena. On February 26, 1997, this Court held a hearing on the Motion to Compel and ruled that those tapes pertaining to lysine only and those tapes which had been disclosed to the law firm of Simpson Thatcher & Bartlett, counsel to a committee of ADM's board should be disclosed to Plaintiffs.

On April 10, 1997, the Court granted the DOJ's request for certification of interlocutory appeal under 28 U.S.C. § 1292(b). On October 30, 1997, the Seventh Circuit reversed this Court's ruling with instructions to quash Plaintiffs subpoena for invading the law enforcement investigatory privilege. See *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126, 1128 (7th Cir. 1997).

On November 24, 1998, Plaintiffs served a subpoena *duces tecum* on the Department of Justice seeking, *inter alia*, all recordings made by or with the consent of Whitacre during the FBI's investigation. On January 22, 1999, the DOJ agreed to produce the approximately 200 tapes that remain from the DOJ's criminal antitrust investigation. Those tapes introduced in the criminal trial of *United States v. Andreas*, 96 CR 762 (N.D. Ill), which are not included in the 200 figure, are already part of the public record and have been delivered to Plaintiffs and Defendants. On February 12, 1999, ADM moved to quash, or in the alternative, to modify Plaintiffs' subpoena seeking the disclosure of the remaining tapes. In its Motion to Quash, ADM argues that the subpoena must be quashed because Whitacre's taping violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, in that the tapes were not made under color of law pursuant and/or were made with a criminal or tortious purpose. *See* 18 U.S.C. §§ 2511(2)(c) and (2)(d). ADM further argues that even if the tapes were lawfully made either pursuant to § 2511(2)(c) or (2)(d), Title III does not

permit the disclosure of the tapes in an action in which the Government is not a party. *See* 18 U.S.C. § 2517(3). In the alternative, ADM argues that if this Court holds that the tapes may be discovered by Plaintiffs that it appoint a special master to recommend to the Court which portions, if any, of the tapes should be redacted due to a lack of relevancy.

On March 2, 1999, Randall, who served as president of ADM until 1997, moved to intervene and to quash Plaintiffs' subpoena. In his Motion to Intervene and to Quash and accompanying Memorandum in Support, Randall asserts that he is an "aggrieved person" under 18 U.S.C. § 2510(11) because he believes that approximately 20 of his conversations were unlawfully intercepted by Whitacre. Therefore, according to Randall, he should be allowed to intervene pursuant to 18 U.S.C. § 2518(10)(a). In support of his Motion to Quash, Randall asserts the same or similar arguments that are asserted by ADM: the tapes were unlawfully made and Title III does not authorize disclosure to private civil litigants in a case in which the Government is not a party.

The Court held oral arguments on March 22, 1999. This Order follows.

Discussion

I. Standing

Section 2518(10) of Title III provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that--

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice.

18 U.S.C. § 2518(10)(a). Section 2510(11) of Title III defines "aggrieved person" as "a person who was party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11). This provision has been interpreted as conferring standing upon those persons who are (1) "person[s]" under 18 U.S.C. § 2510(6) and (2) either were parties to the intercepted communication or parties on whose premises the intercepted communication took place. *See Alderman v. United States*, 394 U.S. 165, 176 & n.9 (1969); *United States v. Civella*, 648 F.2d 1167, 1171 & n.11 (8th Cir.), *cert. denied*, 454 U.S. 867 (1981).

Plaintiffs do not argue that ADM does not have standing to challenge the disclosure of the tapes. They do, however, argue that Randall does not have standing to intervene. In

support of this argument, Plaintiffs cite the case of *United States v. Dorfman*, 690 F.2d 1217 (7th Cir.1982) (*"Dorfman I"*). In *Dorfman I*, five defendants in the underlying criminal case filed a motion to suppress material obtained by a court-authorized electronic surveillance. The district court denied the motion to suppress. In addition to the defendants' challenge to the wiretap, there were two other related challenges. The first related challenge was brought by five persons whose conversations were intercepted but who were not charged in the indictment. Following the entry of the order denying the defendants' motion to suppress, these five persons filed a motion to suppress the intercepted conversations in which they participated and to obtain access to the transcripts of those intercepted conversations. The district court held that Title III does not grant a suppression remedy broader than that provided by the Fourth Amendment and, therefore, as non-parties, the five people did not have standing under Title III to challenge the wiretap conversations in which they unknowingly participated. These five people appealed the district court's order. *See id.* at 1219-21.

The second related challenge was filed by a gentleman by the name of William Webbe ("Webbe"). Webbe was named in the indictment as an unindicted co-conspirator. Six days after the district court entered its order denying the nonparties' motion to suppress, Webbe filed his own motion to suppress the conversations in which he was a party. After allowing Webbe access to the recordings at issue, the district court denied Webbe's motion to suppress because: (1) Webbe was fully aware of the earlier hearings involving the defendants' motion to suppress but chose not to participate, thereby raising a "classic case for the application of the common law doctrine of laches"; (2) Webbe had already challenged the lawfulness of the surveillance when he was called to testify before the grand jury; (3) Webbe was not a named interceptee on the authorization order and, therefore,

lacked standing to challenge the facial validity of the order; and (4) his motion was denied on the merits for the same reason that the defendants' motion was denied on the merits. *Dorfman I*, 690 F.2d at 1221. Webbe also appealed the district court's ruling.

On appeal, the Seventh Circuit addressed the non-parties' (the five non-party people and Webbe) arguments together. The court of appeals noted that the nonparties were all participants in conversations intercepted under the court authorization in question. Further, their conversations were to be used in a "'trial ... before ... (a) court ... of the United States.'" *Id.* at 1226 (quoting § 2518(10)(a)). Therefore, according to the *Dorfman I* court, "under a literal reading of the statute they are 'aggrieved persons' in a position to move for suppression pursuant to Section 2518(10)(a)." However, the court of appeals still held that the nonparties lacked standing to challenge the recordings. The court stated that because the "defendants were able to test the legality of the interceptions of all the communications that the government intend[ed] to use at trial," the involvement of the nonparties was unnecessary. *Id.* at 1229. The court of appeals further stated:

> Denying the nonparties standing in this context did not deny the court an opportunity to evaluate the legality of the underlying interceptions. . . . Rather, it simply foreclosed the nonparties from separately retesting the legality of the interceptions of their conversations.

Id.

In the course of its opinion, the *Dorfman I* court distinguished its decision from one reached by the Tenth Circuit in *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), *cert. denied*, 457 U.S. 1153 (1982), a case relied upon by Randall in his Memorandum in Support of his Motion to Intervene and Quash. In *Anthony*, the defendant was

convicted of unlawful interception of the wire communications of several individuals, among them, Dr. Vernon Sisney. After entry of the verdict, the defendant moved for discovery of the contents of the tapes of intercepted communications that the defendant had made and that the government had subsequently seized. In response, Dr. Sisney moved to intervene for purposes of opposing the discovery and to suppress the tapes in accordance with 18 U.S.C. § 2515. The district court denied the motion, reasoning that Dr. Sisney did not have standing to suppress the information. The Tenth Circuit reversed and held that Dr. Sisney was, in fact, an "aggrieved person" entitled to invoke the sanction of suppression set forth in § 2515 of Title III. *Id.* at 878.

Distinguishing its case from the *Anthony* case, the *Dorfman I* court stated:

> In *Anthony,* absent Dr. Sisney's involvement, there would have been no one in a position to contest the use or disclosure of the intercepted communications. The only other party to the proceeding, the government, clearly was not an "aggrieved person" as to the challenged conversations. Thus, had the court denied Dr. Sisney standing, his privacy interest in nondisclosure would have been left totally unprotected.

Dorfman I, 690 F.2d at 1229. The *Dorfman I* court further pointed out that had the *Anthony* court denied the nonparty standing to move for suppression, the court "would have been placed in the anomalous position of overseeing the disclosure of admittedly unlawfully intercepted conversations." *Id.* at 1229 n.20.

Randall attempts to distinguish *Dorfman I* from this case. He correctly argues that on more than one occasion the court stated that its decision was based on the facts of the case before it. According to Randall, the "critical facts" in

Dorfman I were the criminal context of the case and the belated nature of the nonparties' motions to suppress. Randall further asserts that unlike Webbe in *Dorfman I*, he "was not indicted in the criminal case, was not a witness at a grand jury, was not a witness at trial for either side, and had absolutely no role in the defense or prosecution of the criminal case." (Randall Reply at 9).

One interpretation of *Dorfman I* is that the distinctions pointed out by Randall are not critical distinctions. Arguably, the *Dorfman I* relied only upon the fact that the defendants were able to test the legality of the interceptions, thereby foreclosing the need of the nonparties to retest the legality of the interceptions. *See Dorfman I* at 1229. A reading of Randall's Memorandum in Support of his Motion to Intervene and to Quash indicates that he is either making or reformulating the arguments made by ADM in its Motion to Quash. Therefore, even though the language of § 2518(10)(a) supports Randall's right to intervene in this case, one reading of *Dorfman I* seems to imply that if a party to the litigation is testing the legality of alleged unlawful interceptions, there is no need, and hence no standing, for a nonparty to test the legality on the same grounds.

However, upon reconsideration of its oral finding made during the March 22, 1999, oral arguments on this matter hearing that Randall did not have standing to intervene, the Court now finds that it cannot overlook the language in *Dorfman I* that the district court's denial of the nonparties standing "in [that] context" did not deny the district court the opportunity to test the legality of the tapes at issue. *See id.* at 1229. Instead, "it simply foreclosed the nonparties from *separately retesting* the legality of the interceptions of their conversations." *Id.* (emphasis added). While Randall's arguments are virtually the same as ADM's, he is not "retesting" the legality of the tapes at issue. He appears before this Court at the same time as ADM to test the legality

of the tapes. Therefore, since the Court is not dealing with a *separate retesting* of the legality of the tapes, but instead a contemporaneous challenge, the Court does not believe that the *Dorfman I* court would hold that Randall does not have standing to intervene. Accordingly, this Court holds that Randall does have standing to intervene pursuant to § 2510(10)(a).

II. "Oral Communication"

The tapes made by Whitacre include both tape recordings of telephone conversations and tape recordings of conversations in which Whitacre and the other person or persons being recorded were physically present in the same room at the same time ("face to face recordings"). Plaintiffs initially argue that Title III does not apply to the recordings of the face to face conversations. For this proposition, Plaintiffs point to the definition of "oral communications" in 18 U.S.C. § 2510(2):

> "[O]ral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception *under circumstances justifying such expectation*. . . .

(emphasis added).

In *In the Matter of John Doe Trader Number One*, 894 F.2d 240, 242 (7th Cir. 1990), the Seventh Circuit stated:

> According to the legislative history of Title III, [the definition of "oral communication"] was intended to parallel the "reasonable expectation of privacy" test created by the Supreme Court in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *See* S.Rep. No. 1097, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin.News 2112-2274. *See also United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985). Thus, Congress limited its protection of "oral

> communications" under Title III to those statements made where "first, a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'

(Alterations in original); *see also Angel v. Williams*, 12 F.3d 786, 790 (8th Cir. 1993) ("We know from the legislative history of the federal wiretap law that the definition of oral communication is intended to reflect existing [Fourth Amendment] law"). Therefore, in order to determine whether the face to face recordings were "oral communications" for purposes of 18 U.S.C. § 2510(2), the Court must ascertain whether those persons recorded by Whitacre during face to face recordings had a reasonable expectation of privacy. *See id.* at 242-43.

In *John Doe Trader*, Doe's conversations were recorded while the defendant was on the floor of the Chicago Mercantile Exchange ("CME"). As stated by the court of appeals:

> Doe's conversations were overheard on the trading floor of the CME. Appellant himself describes this environment as "typically noisy and frantic." The FBI agent conducting the investigation was clearly present only a few feet from Doe and he was able to overhear and record each of Doe's statements. In fact, the agent was a participant in many of these conversations. The tape recorder concealed on the agent was unable to hear more than the agent himself could. Thus, by exposing these statements to the public in this manner, Doe cannot now contend that he reasonably believed his conversations were private and therefore subject to constitutional protection.

Id. The *John Doe Trader* court held that Doe did not have an objectively reasonable expectation of privacy in the recorded

statements and, therefore, the recorded statements were not "oral communications" under § 2510(2). *Id.* at 245.

ADM[1] contends that *John Doe Trader* is readily distinguishable from this case, as the recordings in *John Doe Trader* were made on the busy and frantic floor of the CME, whereas the face to face recordings made by or with the consent of Whitacre were made on ADM's premises. The Court agrees that the floor of the CME may be more frantic than an office or conference room at ADM, and a more public setting. However, this distinction is not dispositive on the issue of whether those people who were recorded by Whitacre during face to face recordings possessed a reasonable expectation of privacy. In *United States v. White*, 401 U.S. 745 (1971), the Supreme Court stated:

> *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), which was left undisturbed by *Katz*, held that however strongly a defendant may trust an apparent colleague, his expectations [that a person with whom he is conversing will then or later reveal the conversation to police] are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal

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[1] Because Randall's arguments are the same as ADM's, the Court's reference to ADM in the Discussion portion of the Order refers to both ADM and Randall with the exception of Part IV of the Discussion portion, which addresses an argument not made by Randall—whether the Court should appoint a special master.

> it." *Hoffa v. United States*, at 302, 87 S.Ct., at 413. No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, . . . , or when the same agent, unbeknownst to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. . . .

White, 401 U.S. at 749.

In *Hoffa*, Edward Partin ("Partin"), a Teamsters Union official, made repeated visits to James Hoffa's ("Hoffa") hotel suite during the pendency of the Test Fleet trial in 1962 in Nashville, Tennessee. Unbeknownst to Hoffa, Partin was acting as a government informant and made various reports to federal agents concerning conversations held with Hoffa and his associates, disclosing, among other things, endeavors to bribe the Test Fleet jury. One of the petitioners argued that Partin failed to disclose his role as a government informer and, therefore, this vitiated the consent given to Partin to enter the hotel suite and listen in on or participate in the various discussions. The Supreme Court rejected this argument. Although recognizing that a hotel room "can clearly be the object of Fourth Amendment protection," the Court stated:

> In the present case, however, it is evident that no interest legitimately protected by the Fourth Amendment is involved. It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin or in Partin's presence. Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word,

> was not relying on the security of his hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing.

Hoffa, 385 U.S. at 302.

Similarly, those people who were recorded by Whitacre in his presence were relying on their misplaced confidence that Whitacre would not reveal the contents of the conversations. ADM has not argued that Whitacre's presence during these conversations was without consent or that he was a surreptitious eavesdropper. In short, while those people recorded by Whitacre on ADM's premises may have had a subjective expectation that their conversations would be kept private (based on location and also the fact that ADM officials, to include Whitacre, had signed nondisclosure agreements), it was not a reasonable expectation in light of *Hoffa* and *White*. As succinctly stated by the *White* Court:

> Our problem, in terms of the principle announced in *Katz*, is what expectations of privacy are constitutionally "justifiable"--what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants exemplified by *Hoffa* . . . . If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.

White, 401 U.S. at 751-52 (citation omitted).

ADM, however, argues that the Court's conclusion that the face to face recordings are not recordings of "oral

communications" under Title III renders 18 U.S.C. §§ 2511(2)(c) and (2)(d) meaningless. Section 2511(2)(c) provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Section 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

ADM argues that if the face to face recordings are not "oral communications" and, therefore, not subject to the restrictions of Title III, then why did Congress provide that it shall not be unlawful to intercept an oral communication when a person does so acting under color of law or without a tortious or criminal purpose and is a party to the conversation or gives prior consent? *See* §§ 2511(2)(c) and (2)(d).

The Court is not unsympathetic to ADM's argument. On the one hand, the case law in this and other circuits is clear that the definition of "oral communication" in § 2510(2) is intended to parallel the reasonable expectation of privacy test set forth in *Katz*. *See John Doe Trader*, 894 F.2d at 242; *see also Angel*, 12 F.3d at 790. Precedent also clearly establishes that an alleged wrongdoer does not have a reasonable

expectation that a trusted accomplice will not disclose the contents of conversations to the authorities or that the conversations will not be recorded by the accomplice. *See, e.g., White*, 401 U.S. at 751-52. On the other hand, Congress uses the term "oral communication" in §§ 2511(2)(c) and (2)(d) in the same breath that it uses "where such person is party to the communication or one of the parties to the communication has given prior consent to such interception." Therefore, it appears that Congress contemplated that some face to face, consensual recordings would involve a reasonable expectation of privacy on the part of the person or persons who were unaware that they were being recorded.

The Court is well aware of the statutory construction maxim that a statute should not be construed in such a manner as to render words or phrases meaningless, redundant, or superfluous. *See Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1272 (7th Cir.) (citation omitted), *cert. denied*, 510 U.S. 1012 (1993). However, if the Court accepted ADM's argument that Whitacre's consensual, face to face recordings are "oral communications" under § 2510(2), then this Court would have to disregard the precedent that clearly establishes that the definition of "oral communication" parallels the Fourth Amendment reasonable expectation of privacy test established *Katz* and further disregard the case law precedent that holds the Fourth Amendment does not give an alleged wrongdoer protection against a trusted accomplice tape recording or divulging the contents of conversations. In addition, §§ 2511(2)(c) and (2)(d) also refer to wire and electronic types of communication, which, at least in the case of wire communications, are protected against interception regardless of the speaker's reasonable expectation of privacy. *See, e.g., Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 417 n.4 (5th Cir. 1980). While this does not completely address the apparent conflict between § 2510(2) and §§ 2511(2)(c) and (2)(d), it is clear that §§ 2511(2)(c) and

(2)(d) are broader in scope, as they pertain to all three types of communications defined in Title III and not just oral communications.

Accordingly, despite the apparent conflict between § 2510(2) and §§ 2511(2)(c) and (2)(d), the Court concludes that those tape recordings made by or with the consent of Whitacre of conversations at which he and the other person or persons being recorded were physically present are not recordings of "oral communications" and shall be turned over to Plaintiffs and Defendants for purposes of this litigation.

III. 18 U.S.C. § 2517(3)

Although the Court has held that the face to face recordings are not recordings of "oral communications," the issue remains whether the interception of telephone calls by Whitacre may also be disclosed in this litigation. In *Briggs, supra*, the Fifth Circuit stated that a telephone conversation is a "wire communication" as that term is defined in 18 U.S.C. § 2510(1). *Briggs*, 630 F.2d at 417. Such communications are protected against interception by electronic, mechanical, or other devices regardless of the speaker's expectation of privacy. *See id.* at 417 n.4; *see also United States v. Harpel*, 493 F.2d 346, 349 (10th Cir. 1974) (recognizing lack of requirement to prove reasonable expectation of privacy with regard to intercepted wire communications). Accordingly, the Court's preceding expectation of privacy analysis has no bearing on whether the contents of the interceptions of wire communications may be disclosed in this case.

ADM argues that the interceptions of telephone calls may not be disclosed under § 2517, which sets forth under what circumstances lawful interceptions may be disclosed. Plaintiffs, on the other hand, argue that consensual recordings of telephone conversations that are made in accordance with § 2511(2)(c) or (2)(d) are exempt from the restrictions of

§ 2517. For purposes of this analysis, the Court assumes that the wire communications intercepted by Whitacre were lawful under either § 2511(2)(c) or (2)(d).

The specific provision at issue is § 2517(3), which provides:

> Any person who has received *by any means authorized by this chapter*, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted *in accordance with the provisions of this chapter* may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

According to Plaintiffs, interceptions that are made by "consent" or "under color of law" are not "by means authorized by this chapter." They argue that only 18 U.S.C. §§ 2516 and 2518 in Title III describe a procedure to obtain "authorization and approval" by a court for interceptions of wire or oral communications and by Congress using the term "authorized" in § 2517(3) it was referring only to interceptions authorized under §§ 2516 and 2518, not consensual interceptions.

Section 2516 is entitled "Authorization for interception of wire, oral, or electronic communications" and provides, in pertinent part:

> The Attorney General . . . may *authorize* an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order *authorizing* or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made . . . .

18 U.S.C. § 2516(1) (emphasis added). Subsections 2516(2) and (3) provide the same type of authorization to States' Attorneys General, States' Attorneys and United States Attorneys. Section 2518 then sets forth the procedure for filing an application with a judge of competent jurisdiction:

> Each application for an order *authorizing* or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include [the information listed in subsections (1)(a) through (1)(f)].

18 U.S.C. § 2518(1) (emphasis added).

Plaintiffs, however, have failed to point out § 2511(1)(e)(i) uses the term "authorized" in the context of § 2511(2)(c). Section 2511(1)(e)(i) provides that any person who:

> intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, *intercepted by means authorized by* sections 2511(2)(a)(ii), *2511(2)(b) to (c),* 2511(2)(e), 2516, and 2518 of this chapter . . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(Emphasis added). Therefore, it is clear that use of the term "authorized" is not limited to §§ 2516 and 2518.

ADM argues that in addition to § 2511(1)(e)(i) using the term "authorized" in the context of § 2511(2)(c), Plaintiffs have focused on the wrong phrase in § 2517(3). According to ADM, the relevant phrase in § 2517(3) is "in accordance with the provisions of this chapter." ADM contends that consensual recordings pursuant to § 2511(2)(c) or (2)(d) are interceptions made "in accordance with the provisions of this

chapter" and, therefore, are subject to the restrictions of § 2517(3). ADM further cites case authority in support of its argument that § 2517(3) governs the admissibility of tape recordings when they are made in accordance with § 2511(2)(c). In *United States v. Armocida*, 515 F.2d 49 (3rd Cir.), *cert. denied*, 423 U.S. 858 (1975), the defendant challenged the admissibility of certain tape recordings. In upholding the district court's order allowing the tapes, the Third Circuit stated:

> We agree with the Government that the warrantless recordings of a telephone conversation with the consent of only one of the parties is perfectly proper under federal law and that the transcript of such a conversation may be admitted into evidence in a federal prosecution. 18 U.S.C. §§ 2511(2)(c) and 2517(3), taken together, specifically authorize the admission into evidence of warrantless recordings of this type.

Id. at 52; *see also United States v. Infelice*, 506 F.2d 1358, 1365 (7th Cir. 1974) (citing §§ 2511(2)(c) and 2517(3) in support of a holding that tapes made by a government informant were admissible), *cert. denied*, 419 U.S. 1107 (1975); *United States v. Upton*, 502 F.Supp. 1193, 1199 (D.N.H. 1980) ("Read, as they must be, together, 18 U.S.C. § 2511(2)(c) and § 2517(3) specifically authorize the admission into evidence of recordings of this type.").

The Court agrees that the phrase "intercepted in accordance with the provisions of this chapter" in § 2517(3) clearly contemplates interceptions of consensual recordings made in accordance with § 2511(2)(c) or (2)(d). In other words, consensual recordings that are made under color of law or without a criminal or tortious purpose are recordings made "in accordance with" Title III. Accordingly, the Court holds that § 2517(3) controls the disclosure of the recordings of wire communications made by Whitacre.

Reaching this conclusion, however, provides, at best, only a small piece of the statutory puzzle. ADM argues that even assuming the tapes made by Whitacre of phone conversations were lawfully made pursuant to § 2511(2)(c) or (2)(d), § 2517(3) prohibits their disclosure in civil cases in which the Government is not a party. In *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015 (8th Cir. 1993) (en banc) (7-5 decision), which is the principal case relied upon by ADM, the Eighth Circuit held that there is no authority in Title III for pretrial or compelled testimonial disclosure of sealed electronic surveillance evidence to a private civil RICO litigant. *Id.* at 1020. The *Electronic Surveillance* majority stated that while the argument for disclosure to private civil litigants based on the language of § 2517(3) has "surface plausibility", there is no indication in the legislative history that Congress ever intended to open the discovery door in Title III to private civil litigants:

> As originally enacted, section 2517(3) provided for courtroom testimonial disclosure only in criminal proceedings. . . . With the passage of RICO in 1970, Congress amended the wiretap statute to allow for testimonial use in civil proceedings as well. Organized Crime Control Act of 1970, Pub.L. No. 91-542, § 902(b), 84 Stat. 922, 947 (1970). In support of his argument that the statute now authorizes pretrial discovery, Smith cites cases in which wiretap evidence has been used by an agency other than that which initially sought the wiretap. For example, Smith cites to cases in which the Internal Revenue Service obtained wiretap evidence from the FBI for use in civil prosecutions. Such cases provide no authority for disclosure, pretrial or otherwise, to a private civil litigant.

The legislative history of the 1970 amendment adds little support to Smith's argument. As the district court noted, the

legislative history merely indicates the obvious, that the change "amends 18 U.S.C. 2517 to permit evidence obtained through the interception of wire or oral communications under court order to be employed in civil actions." The language of this brief commentary suggests, however, that Congress envisioned the gatherer of such evidence, *i.e.*, a law enforcement or governmental investigative agency, to be the party making use of the evidence in a civil case. *If the change had been intended to open the door to private civil litigants, further comment would have been warranted.*

Id. at 1018-19 (emphasis added).

The *Electronic Surveillance* court is not alone in its holding. In *National Broadcasting Co. v. United States Dep't of Justice*, 735 F.2d 51 (2nd Cir. 1984), the Second Circuit held that NBC was not entitled to surveillance tapes made by the DOJ. NBC's alleged need for the tapes at issue arose out of a libel suit brought against NBC by Wayne Newton. Since the issue of falsity was at the center of the libel action, NBC sought permission to inspect and copy for use in its defense various materials surrounding and including interceptions made by the Government in a related RICO criminal case. In pursuing this information, NBC relied upon § 2517(3), and like the party that sought interceptions in *Electronic Surveillance, supra*, NBC relied upon the 1970 amendments to Title III which expanded § 2517(3) to include civil proceedings. The Second Circuit rejected this argument, stating, "[W]e are sure that Congress did not utilize a provision of the Organized Crime Control Act [of 1970] to make the fruits of wiretapping broadly available to all civil litigants who show a need for them." *NBC*, 735 F.2d at 54; *see also County of Oakland v. City of Detroit*, 610 F.Supp. 364, 370 (E.D. Mich. 1984) (same).

While this Court respects the decisions of the Second and Eighth Circuits, and gives substantial deference to them, it is

not bound by them. Section 2517(3) unambiguously states that the contents of lawful interceptions may be disclosed "while giving testimony under oath or affirmation *in any proceeding held under the authority of the United States* or of any State or political subdivision thereof." (Emphasis added) If Congress intended to limit disclosure of contents of interceptions to cases in which the Government is a party, it chose the wrong language to do so. The phrase "in any proceeding held under the authority of the United States" is not limiting in nature and includes a private, civil antitrust action brought under the Sherman Act, which is a proceeding held under the authority of this United States district court.

ADM, however, argues that even if § 2517(3) facially permits disclosure in civil litigation in which the Government is not a party, § 2517(3) does explicitly not allow for pre-trial discovery of the wire interceptions. For this proposition, ADM cites the cases of *County of Oakland, supra,* 610 F.Supp. at 370-71, and *Dowd v. Calabrese,* 101 F.R.D. 427, 435 (D.D.C. 1984) (disclosure of interceptions can be made only during the testimony of a Government agent). In *Dowd,* for example, two Assistant U.S. Attorneys brought libel actions against the Wall Street Journal ("the Journal") for a story that asserted that the attorneys improperly pressured an individual into testifying at a criminal trial. The Journal filed motions to compel which sought disclosure of two wiretap tapes. The Journal claimed that the tapes would support the truthfulness of its story. A portion of these tapes were presented during the criminal trial. The *Dowd* court ruled that the Journal was entitled to the portions of the tapes which were made public. As to the remaining tapes, the court stated, "There are several problems with this request. In the first place, section 2517(3) of Title III . . . explicitly provides for disclosure only 'while [the individual is] giving testimony under oath or affirmation.' . . . That is not what is involved here." *Id.* at 435. The *Dowd* court took the position that

disclosure of the wiretap materials not presented in a trial cannot be required pursuant to pre-trial discovery subpoenas.

Admittedly, § 2517(3) does not explicitly authorize pre-trial disclosure of the contents of wire interceptions. On the one hand, pre-trial disclosure seems implicit if such interceptions can be used "in any proceeding held under that authority of the United States . . . ." § 2517(3). On the other hand, by permitting disclosure of lawfully obtained intercepts "only under the specific circumstances listed in 18 U.S.C. § 2517, *Title III implies that what is not permitted is forbidden . . .*." *United States v. Dorfman,* 690 F.2d 1230, 1232 (7th Cir. 1982) ("*Dorfman II*") (emphasis added). So, the Court is faced with a statutory quagmire. The broad language "in *any* proceeding held under the authority of the United States" clearly contemplates use of interceptions in civil litigation even when the Government is not a party. On the other hand, the phrase preceding this broad language --"while giving testimony under oath or affirmation"-- does not contemplate the type of pre-trial discovery sought by Plaintiffs of the interceptions made by Whitacre of telephone conversation. Plaintiffs asserted during oral argument that the initial disclosure of the wire interceptions from the DOJ to the parties could occur by way of deposition or affidavit, which would, perhaps, technically meet the "under oath or affirmation" requirement of § 2517(3). However, testimony or affidavits are one thing, but turning over the interceptions of the telephone conversations is something else.

Again, the Court fully recognizes the conflict between its conclusions with respect to § 2517(3) -- the language contemplates use at trial but does not address pre-trial discovery. Whether Congress intended such a result, the Court can only guess. However, this Court must be guided by the words used by Congress and the precedent that

establishes that what is not permitted under § 2517 is forbidden.[2]

As a final comment on this issue, it is the Court's belief that Congress needs to clarify the language in § 2517. In fact, the other statutory issues addressed in this Order point to a need for Congressional review of this statute. While judges are correctly admonished to refrain from rewriting legislation, we are sometimes forced to interpret legislation that is contradictory or ambiguous.

IV. Special Master

ADM argues that it is likely that there are portions of the face to face recordings which are irrelevant to the issues in this litigation and, therefore, this Court should appoint a special master to review the tapes and recommend to the Court which portions of the tapes, if any, should be redacted prior to the tapes being provided to Plaintiffs. The Court, while not unsympathetic to ADM's arguments denies this request.

There is already in place in this case the First Addendum to the Protective Order of May 2, 1996, which restricts the availability of the tape recordings to specified attorneys for Plaintiffs and Defendants ADM, Cargill, A.E. Staley Manufacturer, and American Maize Products Company (now known as Cerestar USA, Inc.). (*See* Doc. # 279, First Addendum to the Protective Order of May 2, 1996). After Defendants have reviewed the tapes ordered to be turned over and have identified which portions they believe to be

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[2] Because the Court has held that the contents of the interceptions of wire communications are not discoverable during pre-trial proceedings, the parties agree that there is not a need for any further hearing at this time to determine whether the interceptions were lawfully made pursuant to § 2511(2)(c) or (2)(d).

irrelevant to this case and the tag-along case of *Gray & Co. v. ADM, et al.*, they may seek relief from this Court in the form of redacting the alleged irrelevant portions of the tapes if they are unable to reach an agreement with Plaintiffs.

The parties are in a much better position than a special master would be in of determining what information from the tapes is relevant to this case. This is true even if the Court and the parties were to give a special master a crash course on a case that is nearing the four year mark.

Accordingly, the request for a special master is denied.

Conclusion

For the reasons stated herein, ADM's Motion to Quash or, in the Alternative, to Modify Plaintiffs' Subpoena is GRANTED IN PART and DENIED IN PART and Randall's Motion to Intervene and to Quash Class Plaintiffs Subpoena Duces Tecum is GRANTED IN PART and DENIED IN PART.

Those tape recordings made by or with the consent of Whitacre of conversations at which he and the other person or persons being recorded were physically present shall be turned over to Plaintiffs and Defendants. Plaintiffs and Defendants shall handle the tapes in accordance with the First Addendum to the Protective Order of May 2, 1996. Randall's attorney, Jeffrey Cole, shall also be allowed to review those portions of the face to face recordings to which Randall was a party. Prior to reviewing the tapes, however, Mr. Cole shall read the Protective Order of May 2, 1996 and the First Addendum to the Protective Order, sign a copy of the certificate attached as Exhibit B to the First Addendum, and return the certificate to this Court. The Clerk of the Court shall send a copy of the Protective Order and First Addendum (Doc. Nos. 98 and 279) via first class mail to Mr. Cole. He shall review the tapes at the law firm of Williams &

Connolly, which is the law firm that, pursuant to paragraph four of the First Addendum to the Protective Order, is designated as the custodian of tapes for the single copy provided to Defendants.

The interceptions of telephone conversations made by or with the consent of Whitacre are not discoverable.

Lastly, the Court denies ADM's request to appoint a special master.

Supplement to Order

Upon consideration of Defendant Archer Daniels Midland Company's ("ADM") Application for Certification Pursuant to 28 U.S.C. § 1292(b) and Class Plaintiffs and Plaintiff Gray & Company's respective Cross-Applications for Certification Pursuant to 28 U.S.C. § 1292(b), and there being good cause shown to grant the Applications, the Court certifies this Order under 28 U.S.C. § 1292(b). The Court is of the opinion that the Order involves the following controlling questions of law as to which there are substantial grounds for difference of opinion, and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation:

1. Does the recording of a face-to-face communication by, or with the consent of, a party to the communication take the conversation outside the scope of 18 U.S.C. § 2510(2), which defines "oral communication," so that the recording is lawful under Title III without regard to:

(a) whether the communication was recorded by "a person acting under color of law" (*see* 18 U.S.C. § 2511(2)(c)); or

(b) whether, if not recorded by a person acting under color of law, the recording was made "for the purpose of committing any criminal or tortious act" (*see* 18 U.S.C. § 2511(2)(d))?

2. Are consensual recordings made pursuant to 18 U.S.C. § 2511(2)(c) or (2)(d) exempt from the mandates of 18 U.S.C. § 2517?

3. If consensual recordings made pursuant to 18 U.S.C. § 2511(2)(c) or (2)(d) are not exempt from the mandates of 18 U.S.C. § 2517, does § 2517(3) authorize the disclosure and use of such recordings in civil cases to which the Government is not a party? and

4. If 18 U.S.C. § 2517(3) authorizes the disclosure and use of tapes of consensual recordings made pursuant to 18 U.S.C. § 2511(2)(c) or (2)(d) in civil cases to which the Government is not a party, does § 2517(3) permit disclosure of such tapes during discovery in response to a subpoena, or does it instead restrict disclosure to testimony given at trial?

The conflicting and ambiguous statutory provisions discussed in this Order, as well as the uncertain state of the case law, create substantial ground for difference of opinion. *See, e.g., ante,* at 18 (noting "the apparent conflict between § 2510(2) and §§ 2511(2)(c) and (2)(d)"); *ante,* at 18-20 (noting this Court's disagreement with the decisions of the Second and Eighth Circuits). Moreover, the questions are "controlling" under 28 U.S.C. § 1292(b) because their resolution "is quite likely to affect the further course of the litigation." *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.,* 86 F.3d 656, 659 (7th Cir. 1996).

As previously noted by the Court in the Order, the DOJ, the recipient of Plaintiffs' subpoena, has represented that just under 200 recordings are involved. This is plainly a case in which "interlocutory reversal may save time for the district court, and time and expense for the litigants." *Johnson v. Burken,* 930 F.2d 1202, 1206 (7th Cir. 1991) (citation and internal quotation marks omitted). For example, if the court

of appeals were to disagree with this Court's resolution of both the first and third issues set forth above, it would then be unnecessary to incur the time and expense of examining a variety of issues which are otherwise likely to result in this trial (*e.g.*, redactions, reliability, authenticity).

As a final comment, the Court briefly addresses Plaintiffs' argument that the first issue set forth above should not be certified for interlocutory appeal. Plaintiffs argue that this issue has already been resolved by the Seventh Circuit in *John Doe Trader, supra*. Although the Court relied on *John Doe Trader* in resolving the first issue, the apparent conflict between the definition of "oral communication" in § 2510(2) and the exceptions found in §§ 2511(2)(c) and (2)(d) to Title III's prohibition against intercepting oral communications was not addressed by the *John Doe Trader* Court. Accordingly, the Court rejects Plaintiffs argument that the first issue should not be certified under 28 U.S.C. § 1292(b) for interlocutory appeal.

ENTERED this 27th day of April, 1999.

Michael M. Mihm
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE: HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION MDL NO. 1087 AND)

This document relates to master file no. 95-1477 all actions

ORDER

Upon consideration of Defendant Archer Daniels Midland Company's ("ADM") Application for Certification Pursuant to 28 U.S.C. § 1292(b) and Class Plaintiffs and Plaintiff Gray & Company's respective Cross-Applications for Certification Pursuant to 28 U.S.C. § 1292(b), and there being good cause shown to grant the Applications [#485 and #487 in case no. 95-1477 and #157 in case no. 97-1203], this Court hereby amends its Order of March 25, 1999 to add the following wording to page 26 of the Order, and directs the Clerk of the Court to substitute for the original Order an Amended Order which contains this additional material:

Certification

The Court certifies this Order under 28 U.S.C. § 1292(b). The Court is of the opinion that the Order involves the following controlling questions of law as to which there are substantial grounds for difference of opinion, and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation:

1. Does the recording of a face-to-face communication by, or with the consent of, a party to the communication take the conversation outside the scope of 18 U.S.C. § 2510(2), which

defines "oral communication," so that the recording is lawful under Title III without regard to:

> (a) whether the communication was recorded by "a person acting under color of law" (*see* 18 U.S.C. § 2511(2)(c)); or
>
> (b) whether, if not recorded by a person acting under color of law, the recording was made "for the purpose of committing any criminal or tortious act" (see 18 U.S.C. § 2511(2)(d))?

2. Are consensual recordings made pursuant to 18 U.S.C. § 2511(2)(c) or (2)(d) exempt from the mandates of 18 U.S.C. § 2517?

3. If consensual recordings made pursuant to 18 U.S.C. § 2511(2)(c) or (2)(d) are not exempt from the mandates of 18 U.S.C. § 2517, does § 2517(3) authorize the disclosure and use of such recordings in civil cases to which the Government is not a party? and

4. If 18 U.S.C. § 2517(3) authorizes the disclosure and use of tapes of consensual recordings made pursuant to 18 U.S.C. § 2511(2)(c) or (2)(d) in civil cases to which the Government is not a party, does § 2517(3) permit disclosure of such tapes during discovery in response to a subpoena, or does it instead restrict disclosure to testimony given at trial?

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Tushie-Montgomery Assoc., Inc., 86 F.3d 656, 659 (7th Cir. 1996).

As previously noted by the Court in the Order, the DOJ, the recipient of Plaintiffs' subpoena, has represented that just under 200 recordings are involved. This is plainly a case in which "interlocutory reversal may save time for the district court, and time and expense for the litigants." *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (citation and internal quotation marks omitted). For example, if the court of appeals were to disagree with this Court's resolution of both the first and third issues set forth above, it would then be unnecessary to incur the time and expense of examining a variety of issues which are otherwise likely to result in this trial (*e.g.*, redactions, reliability, authenticity).

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ENTERED this 27th day of April, 1999.

Michael M. Mihm
United States District Judge

APPENDIX E

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, provides:

§ 2510. **Definitions**

As used in this chapter–

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than–

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means–

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to

enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code;

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include–

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

(13) "user" means any person or entity who–

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not–

(A) scrambled or encrypted:

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

[(F) Repealed. Pub.L. 104-132, Title VII, § 731(2)(C), Apr. 24, 1996, 110 Stat. 1303]

(17) "electronic storage" means–

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; and

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

§ 2511. **Interception and disclosure of wire, oral, or electronic communications prohibited**

(1) Except as otherwise specifically provided in this chapter any person who–

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when–

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the

operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b) to (c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or on officer, employee, or agent

of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with–

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall

disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of

committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person–

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted–

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which–

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter–

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication–

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then–

(i) if the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted–

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is–

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection–

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and

such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

§ 2512. **Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited**

(1) Except as otherwise specifically provided in this chapter, any person who intentionally–

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of–

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire, oral, or electronic communications, knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce, shall be fined under this title or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for–

(a) a provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of the business of providing that wire or electronic communication service, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof,

to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications.

(3) It shall not be unlawful under this section to advertise for sale a device described in subsection (1) of this section if the advertisement is mailed, sent, or carried in interstate or foreign commerce solely to a domestic provider of wire or electronic communication service or to an agency of the United States, a State, or a political subdivision thereof which is duly authorized to use such device.

§ 2513. Confiscation of wire, oral, or electronic communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

§ 2514. Repealed. Pub.L. 91-452, Title II, § 227(a), Oct. 15, 1970, 84 Stat. 930]

§ 2515. **Prohibition of use as evidence of intercepted wire or oral communications**

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of–

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to

sabotage of nuclear facilities or fuel), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 90 (relating to protection of trade secrets), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots) chapter 65 (relating to malicious mischief), chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 215 (relating to bribery of bank officials), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1032 (relating to concealment of assets), section 1084 (transmission of wagering information), section 751 (relating to escape), section 1014 (relating to loans and credit applications generally; renewals and discounts), sections 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential and Presidential staff assassination, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1958 (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 (relating to violent crimes in aid of racketeering activity), section 1954 (offer, acceptance, or solicitation

to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by wire, radio, or television), section 1344 (relating to bank fraud), sections 2251 and 2252 (sexual exploitation of children), sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521(b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 38 (relating to aircraft parts fraud), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), and section 1341 (relating to mail fraud), section 351 (violations) with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, and assault), section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), section 175 (relating to biological weapons), section 1992 (relating to wrecking trains), a felony violation of section 1028 (relating to production of false identification documentation), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or

citizenship papers), section 1541 (relating to passport issuance without authority), section 1542 (relating to false statements in passport applications), section 1543 (relating to forgery or false use of passports), section 1544 (relating to misuse of passports), or section 1546 (relating to fraud and misuse of visas, permits, and other documents);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions);

(h) any felony violation of sections 2511 and 2512 (relating to interception and disclosure of certain communications and to certain intercepting devices) of this title;

(i) any felony violation of chapter 71 (relating to obscenity) of this title;

(j) any violation of section 60123(b) (relating to destruction of a natural gas pipeline) or section 46502 (relating to aircraft piracy) of title 49;

(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);

(l) the location of any fugitive from justice from an offense described in this section;

(m) a violation of section 274, 277, or 278 of the Immigration and Nationality Act (8 U.S.C. 1324, 1327, or 1328) (relating to the smuggling of aliens);

(n) any felony violation of sections 922 and 924 of title 18, United States Code (relating to firearms);

(o) any violation of section 5861 of the Internal Revenue Code of 1986 (relating to firearms);

(p) a felony violation of section 1028 (relating to production of false identification documents), section 1542 (relating to false statements in passport applications), section 1546 (relating to fraud and misuse of visas, permits, and other documents) of this title or a violation of section 274, 277, or 278 of the Immigration and Nationality Act (relating to the smuggling of aliens);

(p) any conspiracy to commit any offense described in any subparagraph of this paragraph.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year,

designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of any Federal felony.

§ 2517. **Authorization for disclosure and use of intercepted wire, oral, or electronic communications**

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter

may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. **Procedure for interception of wire, oral, or electronic communications**

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained

from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that–

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify–

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance. Pursuant to section 2522 of this

chapter, an order may also be issued to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act.

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that–

(a) an emergency situation exists that involves–

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately

terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of

competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of–

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other

proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that–

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(c) The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if–

(a) in the case of an application with respect to the interception of an oral communication–

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(iii) the judge finds that such specification is not practical; and

(b) in the case of an application with respect to a wire or electronic communication–

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application identities the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;

(iii) the judge finds that such showing has been adequately made; and

(iv) the order authorizing or approving the interception is limited to interception only for such time as it is reasonable to presume that the person identified in the application is or was reasonably proximate to the instrument through which such communication will be or was transmitted.

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do not apply by reason of subsection (11)(a) shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (11)(b) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court,

upon notice to the government, shall decide such a motion expeditiously.

§ 2519. **Reports concerning intercepted wire, oral, or electronic communications**

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts–

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for (including whether or not the order was an order with respect to which the requirements of sections 2518(1)(b)(ii) and 2518(3)(d) of this title did not apply by reason of section 2518(11) of this title);

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political

subdivision of a State, shall report to the Administrative Office of the United States Courts–

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, (iv) the number of orders in which encryption was encountered and whether such encryption prevented law enforcement from obtaining the plain text of communications intercepted pursuant to such order, and (v) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire, oral, or electronic communications pursuant to this chapter and the number of orders and extensions granted or denied pursuant to this chapter during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

§ 2520. **Recovery of civil damages authorized**

(a) In general.–Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief.–In an action under this section, appropriate relief includes–

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages.–(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if

the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of–

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) Defense.–A good faith reliance on–

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation.–A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.